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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. When the District Court and the Court of Appeals find that a judgment was infected by the prevailing party's deliberate scheme to use the judiciary as an instrument of a fraud, designed to secure a damage judgment by manufacturing "evidence," presenting it to a trial court and jury (and thereafter to the Court of Appeals) and sealing the silence of the perpetrators through payoffs, are the courts actually powerless to set aside that judgment despite the doctrine of fraud upon the court enunciated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944)?

2. Is the authoritative standard for determining whether relief from a fraudulently obtained judgment should be granted in an independent action of equity that set forth in *United States* v. *Throckmorton*, 98 U.S. 61 (1878), or that of *Marshall* v. *Holmes*, 141 U.S. 589 (1891)? If the "intrinsic/extrinsic" distinction of *Throckmorton* is authoritative, what does it mean?

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OPINIONS BELOW

1. *The Proceedings to Set Aside the Original Judgment*

The Opinion of the United States Court of Appeals for the Fourth Circuit of April 12, 1982 is reported at 675 F.2d 1349. It is reproduced at pp. 1a-34a of the separately bound Appendix to this Petition ("A."). The Memorandum of the United States District Court for the Eastern District of Virginia of August 27, 1981 is reported at 108 LRRM 2155 and is reproduced at A. 38a-46a. The Opinion of the United States Court of Appeals for the Fourth Circuit of December 23, 1980 remanding the case for findings is reported at 639 F.2d 780 and is reproduced at A. 47a-48a. The Order and Memorandum of the United States District Court for the Eastern District of Virginia of February 29, 1980 is reported at 86 F.R.D. 131 and is reproduced at A. 49a-64a.

2. *The Proceedings Leading to the Original Judgment*

The Opinion of the District Court sustaining the jury verdict on liability and granting a new trial on damages is reported at 350 F. Supp. 1377 and is reproduced at A. 65a-75a. The Opinion of the Court of Appeals affirming the damage judgment in plaintiff's favor is reported at 511 F.2d 839 and an Order denying rehearing is reported at 532 F.2d 956; these are reproduced at A. 76a-92a and 93a-94a, respectively.

JURISDICTION

The Order of the United States Court of Appeals denying a timely petition for rehearing was entered on July 1, 1982 (A. 36a-37a). On September 14, and October 26, 1982 Chief Justice Burger entered Orders extending the time for filing this Petition first to October 29, and then to November 8, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 60(b) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; * * * (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * * This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, * * * or to set aside a judgment for fraud upon the court * * *.

STATEMENT OF THE CASE

Prefatory Statement

This Petition involves the denial of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America's ("IBT") motion to set aside a fraudulently obtained federal court judgment in excess of $800,000. That motion was based, *inter alia*, upon the doctrine of fraud upon the court enunciated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) (*"Hazel-Atlas"*). The Court of Appeals, affirming the findings of the District Court, concluded that Great Coastal Express, Inc. ("Great Coastal" or "the Company") had engaged in a deliberate and "reprehensible" (A. 17a) scheme of fraud in obtaining that judgment. That scheme was more specifically described with no disagreement from the majority, in the dissenting opinion of Judge Butzner:

> The unrefuted evidence of the 1979 hearing conducted by the district court and the court's supplementary findings establish beyond doubt that Great Coastal, its officers, and employees engaged in "a deliberately planned and carefully executed scheme to defraud" the National Labor Relations Board, the district court, and the court of appeals. Their fraud was no isolated instance of perjury. To achieve their purposes, the officers and employees created spurious evidence, deceived the Virginia State Police, answered interrogatories under oath untruthfully, filed false affidavits and gave perjured testimony in administrative and judicial proceedings, introduced fabricated exhibits, and filed a corrupt brief and appendix on appeal.
>
> By payments and promises of payments, Great Coastal frustrated discovery of its fraud through the judicial processes afforded by the Rules of Civil Procedure. Moreover, its scheme did not end with the entry of judgment. Like the litigant in *Hazel-Atlas*, it later attempted to forever seal its deception by the

> payment of large sums of money to the participants in its fraudulent scheme. And, as in *Hazel-Atlas*, it succeeded in cloaking its wrong for several years. (A. 33a).

The majority affirmed the findings of the District Court, and additionally, agreed that it was impossible to find that the manufactured evidence had not been considered by the jury (A. 10a-11a). Moreover, because the Company had argued to the Fourth Circuit on the appeal from the original judgment that the violence was "inextricably tied in with" secondary boycotting activity, the majority also held that "[s]uch argumentation falls directly within the prescription of *Hazel-Atlas* * * * and we are precluded from inquiring as to the materiality or effect on [the Fourth Circuit's affirmance of the damage verdict]" (A. 11a). Nonetheless, the majority went on to conclude that they could not grant relief because Great Coastal's conduct did not amount to "fraud upon the court" as they read—and we urge greatly misunderstood—*Hazel-Atlas*. The Court of Appeals ruled further that the IBT was not entitled to relief under the theory of an independent action in equity.

I. THE PROCEEDINGS LEADING TO GREAT COASTAL'S JUDGMENT AGAINST IBT

In August 1970, Teamsters Local 592 ("Local 592") struck Great Coastal over the Company's refusal to sign a collective bargaining agreement. In December 1970, Great Coastal filed a state court action (later removed to federal court) seeking damages for alleged (1) acts of union violence and (2) conduct violative of §§ 8(b)(4)(B) and 303 of the National Labor Relations Act ("NLRA") (A. 4a). Local 592 was not named as a defendant; rather, Great Coastal sued only the IBT, on the theory that the local union acted as its agent.

When the case came to trial in 1972, Great Coastal was permitted to introduce evidence of "anonymous" acts of

violence from numerous witnesses upon its counsel's repeated proffers that it would be "hook[ed] up" to the IBT (1972 Transcript, p. 12). Despite those proffers, no evidence was introduced with respect to the identity of those "anonymous" persons who had destroyed Great Coastal property. In response to the IBT request that such evidence be stricken, the trial court responded:

> I am not being facetious, but I don't believe this jury or anybody else on God's green earth is going to believe that 110 tires through atmospheric conditions went flat. It was because of the strike. (1972 Transcript, pp. 567-568).

Thus, while the trial court directed a verdict for the IBT on the violence claim, it not only permitted the § 303 claim to go to the jury, but over the IBT's objection, it instructed that the evidence of violence could be considered as part of the "totality of circumstances" in determining whether the IBT had violated the secondary boycott provisions of the NLRA (A. 10a). The District Court's rationale was that it is "a fair inference" that "anybody that would do what that evidence says [i.e., commit 'despicable' acts of violence], they wouldn't hesitate to do anything [i.e., violate the secondary boycott laws] if they had something to gain" (1972 Transcript, p. 819). The factual issues in dispute for the jury to decide with respect to Great Coastal's secondary boycott claim were whether ambulatory picketing during the course of the strike had an object forbidden by § 303 and whether the IBT was responsible therefor under the common law of agency. The jury returned a verdict against IBT on the secondary boycott claim. And although Great Coastal had contended that its damages caused by secondary boycotting amounted to $942,065, the jury returned a verdict for $1,300,000 (A. 70a). The trial court concluded that the jury "while well intentioned, was in spite of the Court's instructions to the contra[ry] influenced in its consideration of damages by the gross and vicious conduct [which

it] attributed to the members of the local union and their sympathizers" (A. 71a). Nonetheless, the trial court permitted the jury's liability finding to stand and ordered a new trial solely on the issue of damages. *Id.* The second trial was held in 1973, and the second jury returned a verdict of $806,092 (A. 5a).

The IBT appealed from the judgment. Great Coastal cross-appealed with respect to the directed verdict on the violence claim, but said that it would "not press its appeal on the violence" if the secondary boycott judgment were affirmed (see A. 53a). The Company's tactics on that appeal are a matter of record. They were aptly summarized by Judge Butzner, without disagreement from the majority, as follows:

> To the district court's findings I need add only that Great Coastal persisted in its fraud when this court heard the union's appeal from the judgment awarding the company damages for the secondary boycott. Contrary to its present position, Great Coastal asserted in its brief that the secondary boycott activity "was inextricably tied in with violence . . . ." Great Coastal, however, did not reveal that this violence was self-inflicted. Instead, its brief relied on the perjured testimony of [several] witnesses, and it embellished the appellate record with photographs of the truck that [a Great Coastal employee], acting on orders of company officials, had damaged with a brick and bullets. (A. 29a).

In January 1975, the Fourth Circuit affirmed the judgment (A. 92a), and a petition for a writ of certiorari was subsequently denied by this Court. 425 U.S. 975 (1976). In June 1976, the IBT mailed Great Coastal a check for almost one million dollars to satisfy the judgment plus interest and costs (A. 6a).

II. THE INSTANT PROCEEDINGS TO SET ASIDE THE JUDGMENT

A. Discovery of the Fraud and the Justice Department's Conclusion That the Statute of Limitations Bars Criminal Prosecution

In early 1977, IBT counsel, having received information that Great Coastal had deliberately sabotaged its own equipment with the intention of attributing responsibility to the IBT (A. 6a), conducted an investigation and turned over the results to the Department of Justice. The Department conducted a grand jury investigation but, in 1978, concluded that the statute of limitations precluded criminal prosecution. Following the 1979 evidentiary hearing, the District Court directed an inquiry to the Department, which responded that criminal prosecution was time-barred, stating that it reached this conclusion "reluctan[tly] in view of the effect this conduct may have had on a federal judicial proceeding" (see A. 6a).

B. The District Court and Court of Appeals Conclude That, Despite Great Coastal's Proven Fraud, the Courts Are Powerless to Grant Relief

In December 1978, the IBT filed a Motion To Set Aside Judgment before the District Court. Following full discovery, an evidentiary hearing was held in July 1979. In its February 1980 decision, the District Court found it "unnecessary" to make factual findings because of its view that (1) the doctrine of fraud upon the court required proof that an officer of the court was involved in the fraud, and there was no such evidence (A. 58a-61a); and (2) the "independent action in equity" could not succeed because Great Coastal's fraud involved "intrinsic" rather than "extrinsic" fraud as required by *United States* v. *Throckmorton*, 98 U.S. 61 (1878) (A. 61a-64a).

Accordingly, the court found that the IBT's motion was barred by the one-year limitation period of F.R.Civ.P. 60(b)(3) (A. 55a-56a). On the IBT's appeal,[1] the Fourth Circuit remanded to the District Court for findings of fact on the record created at the July 1979 evidentiary hearing. Pursuant to that direction, the District Court found, *inter alia*, that:

1. Great Coastal's officers and "key managerial employees" ordered Great Coastal drivers to "break up" and "shoot up" Great Coastal trucks (A. 39a-42a).

2. Great Coastal employees followed these instructions by breaking truck windows with bricks, puncturing truck tires with screwdrivers sharpened to a fine point in the Company's maintenance shop, and shooting Company trailers "using a small handgun—a cheap .22 caliber 'Saturday Night Special'" (A. 39a-45a). They perpetrated similar acts of vandalism on competitors of Great Coastal who had hired strikers (A. 43a-44a).

3. The Company President and Company managers expressed "appreciation" as trucks came in damaged, and drivers who returned to the Great Coastal terminal with sabotaged equipment were told by them, "this is what we need" (A. 45a).

4. A Company employee who committed much of the violence executed a false affidavit which was witnessed by a manager of the Company and "specifically incorporated in Great Coastal's answer to IBT Interrogatory No. 14 as 'direct evidence of specific instances of violence, intimidation and secondary boycotting activities which are recorded in written statements attached hereto.' Great Coastal's answers to IBT's interrogatories were executed under oath by * * * Great Coastal's President, and filed with [the District] Court on March 25, 1971" (A. 42a).

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[1] On May 5, 1980, following the procedure approved by this Court in *Hazel-Atlas* (322 U.S. at 247-250), the IBT filed a Petition To Set Aside Judgment in the Court of Appeals seeking relief from the fraud practiced directly upon the Fourth Circuit.

5. The same employee "gave a false affidavit concerning the [violence] * * * to a representative of the National Labor Relations Board * * * [and] also testified falsely about [that violence] in a proceeding before the National Labor Relations Board" (A. 42a).

6. The plaintiff Company introduced the manufactured evidence of violence in the 1972 trial, and argued that the IBT was responsible (A. 42a-43a).

7. In December 1971, Great Coastal's President handed $500 cash to an employee responsible for the Company-inspired violence. "At that time * * * [the President] * * * said * * * 'keep it to [your]self,' and told [the employee] he could 'call it a Christmas bonus or pay for a job well done' " (A. 45a-46a).

8. After the Company recovered almost $1,000,000 from the IBT, it paid over $12,000 to one of its managers who had ordered the violence "as his share of Great Coastal's recovery against the IBT" (A. 46a).

The Court of Appeals affirmed those findings (A. 7a, n. 2), and agreed that the Company's actions were "reprehensible" (A. 17a). Nonetheless, the majority affirmed the District Court's earlier denial of relief and dismissed the IBT's separate Petition, see p. 8, n.1, *supra*. Its refusal to grant relief was based on its view that certain elements needed to set aside the judgment were not present in the case. Specifically, it held that *Hazel-Atlas* would require relief in this case but for the absence of (1) impact of the fraud upon the court itself (such as bribery of a judge or juror) or participation in the scheme by an officer of the court and (2) a "public injury" of the nature established in *Hazel-Atlas* by proof that manufactured evidence was contained in an application filed with and then approved by the United States Patent Office. As for the IBT's independent action in equity, the Court of Appeals held, *inter alia*, that the proof established only "intrinsic" and not "extrinsic" fraud as required by *United States* v. *Throckmorton*, 98

U.S. 61 (1878) (A. 18a-19a). Judge Butzner dissented, concluding that relief was mandated under *Hazel-Atlas* because "[t]he district court's findings on remand clearly establish that the officers and employees of Great Coastal engaged in an extensive, deliberate scheme to subvert justice by perpetrating a fraud on administrative and judicial tribunals" (A. 20a).

REASONS FOR GRANTING THE WRIT

Introduction and Summary of Argument

The findings below establish that this is a case like *Hazel-Atlas* to set aside a judgment obtained by a "deliberately planned and executed scheme to defraud." 322 U.S. at 245. In such a case, *Hazel-Atlas* holds that the policy favoring finality of judgments must yield in order to "fulfill a universally recognized need for correcting injustices which * * * are deemed sufficiently gross" and that the fraudulently obtained judgment must be "devitalized." *Id.* In overturning the balance thus struck in *Hazel-Atlas*, the majority below stated that Great Coastal's "fraud here primarily concerns the two parties involved" (A. 14a); but this was fundamental error because this Court held that "tampering with the administration of justice in the manner shown here * * * is a wrong against the institutions set up to protect and safeguard the public." 322 U.S. at 246. In short, this Court should grant review because the decision below is wholly inconsistent with a carefully considered decision of this Court on an issue involving "the integrity of the judicial process * * *" and because the "public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id.*

Review should be granted also to eliminate the uncertainty which has plagued the lower courts for ninety years concerning the requisites of an independent action in equity to set aside a judgment. Because the problem stems from two apparently irreconcilable decisions of this

Court—*United States* v. *Throckmorton*, 98 U.S. 61 (1878) and *Marshall* v. *Holmes*, 141 U.S. 589 (1891)—it cannot be resolved without a determination by this Court as to which of these is the authoritative precedent. *Throckmorton*, which the court below chose to follow, distinguished between "intrinsic" and "extrinsic" fraud, a distinction which courts and commentators have frequently criticized as unsound and unintelligible. Some courts, including the court below but not others, have adopted a five-part formula for identifying "extrinsic fraud", but even the courts which embrace that formula reach opposite conclusions in cases which, like the present, involve a conspiracy to fabricate evidence and present it to the court; contrast the decision below (denying relief) with *Chicago, R.I. & P. Ry. Co.* v. *Callicotte*, 267 F. 799 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921) (granting relief).

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN *HAZEL-ATLAS*

A. The Doctrine of *Hazel-Atlas*

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), was a proceeding to set aside a judgment for patent infringement. For the purpose of "helping along" their patent application, representatives of the Hartford-Empire Company ("Hartford") had procured the publication in a trade journal of an article attributed to one William P. Clarke, a seemingly distinguished and disinterested expert, who was actually acting at the behest of Hartford. 322 U.S. at 240. The patent was granted, and subsequently Hartford sued the Hazel-Atlas Glass Company ("Hazel") claiming infringement. At the trial, there was no reference to the "Clarke article"; indeed, it entered the trial record only as part of the "file-wrapper" history of the patent application. Hartford lost in the District Court but, on appeal, though it made only one reference to the spurious "Clarke article," obtained a fa-

vorable decision. Following that ruling, the case was settled in 1932 by payment of one million dollars from Hazel to Hartford. *Id.* at 240-243. Shortly thereafter, Hartford gave Mr. Clarke $8000 cash, and later explained the payment as a "moral obligation." *Id.* at 243.

In 1941, the spurious origins of the Clarke article came to light. However, when Hazel filed a petition to set aside judgment, the Third Circuit ruled that (1) Hazel had not been diligent in uncovering the fraud, (2) the fraud had not been "basic" to its earlier decision, and (3) it lacked power to set aside the judgment on a petition filed nine years after expiration of the term of that decision. 137 F.2d 764, 766-770 (1943). In 1944—twelve years after the entry of the original judgment—this Court reversed. In doing so, it acknowledged "the general rule that [courts] would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. * * * This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." 322 U.S. at 244. But the Court continued:

> This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Co.* v. *Hodgson*, 7 Cranch 332; *Marshall* v. *Holmes*, 141 U.S. 589. This equity rule, which was firmly established in English practice long before the foundation of our Republic,[2] the courts have developed and

[2] The Court's reference to "English practice" can be traced to three fraud upon the court cases cited in the Brief for Petitioner Hazel, No. 398 Oct. Term 1943, p. 32: *Richmond* v. *Tayleur*, 24 Eng. Rep. 591 (Ch. 1721), 1 P.Wms. 734, 736-737 (1721); *Brooke*

> fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States* v. *Throckmorton*, 98 U.S. 61. But where the occasion has demanded, where enforcement of the judgment is "manifestly unconscionable," * * * [the courts] have wielded the power without hesitation. * * * [W]hatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered has long since passed away. *Id.* at 244-245 (footnotes omitted).

The Court then distinguished between simple perjury by a witness and the type of conduct which compels a court to correct fraudulently-begotten judgments:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. *Id.* at 245.

This Court next addressed the Third Circuit's rationale that "Hazel had not exercised proper diligence in uncovering the fraud * * *." 322 U.S. at 246. Though the Court expressed doubt as to whether Hazel "should have been expected to do more," it did not regard that issue to be decisive:

> But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be con-

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v. *Lord Mostyn*, 33 Brev. 457, 2 De G. J. & S. 373 (1864); and *The Alfred Nobel*, [1918], p. 293, 119 L.T.R. (n.s.) 320 (Prize Ct. 1918).

> doned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. (322 U.S. at 246; the Court's elaboration of this point is quoted at pp. 18-19, *infra*)

Finally, the Court rejected Hartford's claim that the Clarke article was not "basic" to the Court of Appeals' decision, for having "urged" the court to accept the article, "[t]hey are in no position now to dispute its effectiveness." 322 U.S. at 247.

Justice Roberts alone dissented, and he said:

> No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued (322 U.S. at 251).

The majority in *Hazel-Atlas* determined that the "wrong should be righted" by setting aside the fraudulently obtained judgment and denying the perpetrators the fruits of their wrong.

B. The Facts Accepted by the Court of Appeals Squarely Parallel Those of *Hazel-Atlas*

The majority here conceded that "[t]he analogy [to *Hazel-Atlas*] is indeed close in some respects * * *" (A. 14a); in fact, the cases differ only in that the affront to the judicial system here is more direct. Just as officials of Hartford concocted the Clarke article for the purpose of "helping along" its patent application, so the officers and managers of Great Coastal created evidence of union violence for the purpose of "helping along" its tort action for violence and secondary boycotting. And, while the payments in *Hazel-Atlas* were characterized as "moral

obligations" and "retainer agreements," [8] and the monies distributed by Great Coastal were cloaked in the jargon of "Christmas bonuses" and "profit shares," the basic purpose in each case was to reward monetarily, and to seal the lips of, the perpetrators. Most important, in both cases the fabricated evidence was presented to the court to obtain a substantial judgment; indeed, Great Coastal's misuse of its evidence at trial on appeal far exceeded Hartford's single reference to the Clarke article in the Courts of Appeals. Therefore, just like *Hazel-Atlas*, this case involves "not simply * * * a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to be guilty of perjury," but a "deliberately planned and carefully executed scheme" (*id.* at 245) to manufacture evidence with which to defraud the District Court and the Court of Appeals by securing and sustaining a damage judgment.

C. The Decision of the Court of Appeals is Contrary to the Doctrine of *Hazel-Atlas*

It was this Court's teaching in *Hazel-Atlas* that if a successful litigant uses the courts to perpetrate a deliberate and carefully executed scheme to obtain a judgment through fraud, the court has both the "power" and "duty" to rectify that fraud. 322 U.S. at 249-250. The court below refused to perform that duty in this case. In its view, the doctrine of "fraud on the court" should receive a "narrow construction" lest that concept "overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule" (A. 14a-15a). The court set forth two tests which it ruled that IBT failed to satisfy: (1) " 'fraud on the court' is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is di-

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[8] HA Rec., pp. 37, 114. "HA Rec." refers to the printed Record in this Court in *Hazel-Atlas*, No. 398, October Term 1943.

rectly impinged" (A. 15a), and (2) "the fraud here primarily concerns the two parties involved and does not threaten the public injury that a fraudulently-obtained legal monopoly did in *Hazel-Atlas*" (A. 15a-16a).

The Fourth Circuit's concern that the doctrine of "fraud upon the court" not "overwhelm the specific provision of [Rule] 60(b)(3) * * *" was fundamentally misplaced, since the last sentence of Rule 60(b) states unequivocally:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, * * * or to set aside a judgment for fraud upon the court. * * *[4]

By expressly preserving the judicial power to set aside a judgment for fraud upon the court, Rule 60(b) establishes that that power is not to be subject to or affected by the "time limitation" of subparagraph (3).[5] It estab-

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[4] This "savings clause" was added by the 1946 revisions to the Rule, and the Committee Notes cite the genesis of the change as the Supreme Court's decision, two years earlier, in *Hazel-Atlas*. Advisory Committee Note to 1948 Amendments to Rule 60(b), F.R. Civ.P. *See* 5 F.R.D. 433 at 479.

[5] In discussing the identical language of the New Jersey Rule, Justice Brennan wrote as follows for the Supreme Court of New Jersey:

> However, the fourth sentence of the two rules allowing relief without time limitation for "fraud upon the court" is not similarly specific. Nevertheless, upon principle, we hold that relief for fraud upon the court may be allowed under our rule whether the fraud charged is denominated intrinsic or extrinsic. The notion that repeated retrials of cases may be expected to follow the setting aside of judgments rendered on false testimony will not withstand critical analysis. Rather it is more logical to anticipate that the guilty litigant committing or suborning testimony will not risk pursuing the cause further. And, in any event, a court may not set aside a final judgment merely because some testimony is perjured. All perjury is an affront to the dignity of the court and to the integrity of the judicial process, but the law is not without other effective means to punish the

lishes also that "the balance of equities" which governs this case is not some new balance to be divined by the courts from Rule 60(b) or any of its subdivisions, but that which underlies the "fraud upon the court" doctrine; that balance was struck in the *Hazel-Atlas decision* (see pp. 11-14, *supra*).

The first of the restrictions on the fraud upon the court doctrine which was adopted by the Court of Appeals has its source not in the *Hazel-Atlas* opinion of this Court but in the views of Professor Moore:

> "Fraud upon the court" *should, we believe*, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Fraud inter partes, without more, *should not be* a fraud upon the court, but redress *should be* left to a motion under 60(b)(3) or to the independent action. 7 J. Moore, *Moore's Federal Practice* ¶ 60.33 at 515 (2d ed. 1982), quoted at A. 15a (our emphasis).

There was, of course, no bribe of a judge or juror in *Hazel-Atlas*. Moreover, the theory of attorney involvement is based on Professor Moore's assumption that the Hartford "patent attorney" who composed the spurious article was an "officer of the court."[6] This assumption

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perpetrator of the crime. (*Shammas* v. *Shammas*, 9 N.J. 321, 88 A.2d 204, 208 (1952).)

The court below cited *Shammas* for the proposition contained in the last two sentences of the foregoing passage, *see* A. 16a, but its decision is wholly inconsistent with the reasoning and spirit of the *Shammas* opinion.

[6] Said Professor Moore:

> *One point of difference, although not stressed by the Court in Hazel-Atlas, is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the court.* While he should represent

was erroneous, for the record in *Hazel-Atlas* reflects that "the company 'attorney' who prepared the article with the intent that it be signed by another was in fact a 'patent attorney,' a title given at least at that time to any registered patent agent * * * and was not the member of any bar" (A. 17a) and so was *not* an officer of the court.[7]

Secondly, the court below also held that "[i]t is also apparent that the fraud here primarily concerns the two parties involved and does not threaten the public injury that a fraudulently-obtained legal monopoly did in *Hazel-Atlas*" (A. 15a-16a). The Court of Appeals' conclusion that "public injury" is required to prove fraud upon the court is another serious misunderstanding of *Hazel-Atlas*.

It appears from the Fourth Circuit's summary of "the pertinent parts of the *Hazel-Atlas* analysis" (A. 14a) that its view was based on the following two sentences: "This matter does not concern only private parties. There are issues of great moment to the public in a patent

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his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. *And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.* 7 J. Moore, *Moore's Federal Practice* ¶ 60.33 at 513 (2d ed. 1982) (footnote omitted; emphasis added).

The fact that a Hartford "attorney" was involved in the fraud was indeed "not stressed by the Court in *Hazel-Atlas*": it is not mentioned at all in the Court's thorough discussion of the "fraud upon the court doctrine" (322 U.S. at 244-250), but only in the course of the Court's description of the facts. *Id.* at 240-243.

[7] The Fourth Circuit was apparently troubled by IBT's demonstration concerning the status of the patent attorney in *Hazel-Atlas* for, later in the opinion, the court states that "in view of our holding * * * we need not consider the question of attorney involvement" (A. 17a). But the court's "holding" that *Hazel-Atlas* required "a fraud perpetrated by officers of the Court" (A. 15a) is inconsistent with its subsequent disclaimer.

suit." 322 U.S. at 246 (citing two patent cases). But, as we have shown at pp. 13-14, *supra*, this passage appears not in the portion of this Court's opinion which laid down the standards for determining whether there has been a fraud upon the court (a doctrine "firmly established in English practice" [8]), but only in the course of its rejection of Hartford's lack-of-diligence defense.

Moreover, the Court in *Hazel-Atlas* did not find "public injury" only because of the "fraudulently-obtained legal monopoly" to which the court below referred. Immediately after its reference to patent suits the court continued, "Furthermore,"

> tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. (322 U.S. at 246)

Thus, the assertion below "that the fraud here primarily concerns the two parties involved" is entirely inconsistent with this Court's determination that "tampering with the administration of justice in the manner indisputably shown" in *Hazel-Atlas* and duplicated here—by the fabrication of evidence to utilize the courts as instrumentalities for obtaining a fraudulent damage judgment (see pp. 14-15, *supra*)—"involves far more than an injury to a single

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[8] None of the three English cases upon which this statement was predicated (see *supra*, pp. 12-13, n.2), articulated a "public injury" requirement as an element of the doctrine. Nor, for that matter, did any involve the bribery of a judge or juror or fraud perpetrated by an attorney.

litigant," for it "is a wrong against the institutions set up to protect and safeguard the public." *Id.* at 246.[9]

D. The Fourth and Ninth Circuits Are In Conflict Over the Meaning of *Hazel-Atlas*

The Fourth Circuit's reading of the elements required to establish fraud upon the court conflict not only with *Hazel-Atlas*, but also with those of the Ninth Circuit Court of Appeals in *Toscano* v. *Commissioner of Internal Revenue*, 441 F.2d 930, 934 (9th Cir. 1971). The Court there faithfully followed *Hazel-Atlas* and ruled that the allegations of fraud upon the court were sufficient without requiring any of the elements enunciated by the Fourth Circuit.

The *Toscano* opinion squarely addressed the Moore formulation, and though characterizing it as "a valiant attempt at definition" of the distinction between "fraud" and "fraud on the court," rejected it as "not very help-

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[9] The court below erred even on its own premise that the action itself—as opposed to the fraud—must be of "great moment to the public." In this respect patent suits and § 303 actions are indistinguishable. A properly awarded patent serves the public interest in promoting useful inventions, but an improperly awarded patent defeats the public interest in a free economy. The secondary boycott provisions, embodied in § 303 and its related unfair labor practice provision, § 8(b)(4), present a similar dichotomy. As Justice Powell recently observed in *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, —— U.S. ——, 102 S. Ct. 1656, 1663, n.20 (April 20, 1982):

> The Court frequently has described the purpose of the secondary boycott provisions as twofold: the preservation of the right of labor organizations to place pressure on employers with whom there is a primary dispute as well as the protection of neutral employers and employees from the labor disputes of others. See, e.g., *NLRB* v. *Denver Building Trades Council*, 341 U.S. 675, 692 (1951) (noting the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.")

See also Teamsters Union v. Morton, 377 U.S. 252, 258-260 (1964).

ful" (*id.* at 933-934)[10] and looked directly to *Hazel-Atlas* as the source of the applicable standard. *Id.* at 934-935.

In *Toscano*, taxpayer Zelasko sought to vacate a decision of the Tax Court, claiming that one Toscano had submitted to the Commissioner and the Tax Court a "spurious" claim of an Arkansas marriage to Zelasko and a "spurious" Nevada divorce decree in order to "lend verisimilitude" to his claimed right to file a joint return with her. *Id.* at 935. Finding the submission of this "evidence" analogous to "the spurious article in the Court of Appeals in *Hazel-Atlas*," the court held that Toscano's "wife" was entitled to relief from judgment.

In short, a scheme by which a litigant manufactures spurious evidence, and then presents it to the court in order to obtain a judgment, constitutes fraud upon the court in the Ninth Circuit, but not in the Fourth. This disagreement concerning the scope of a judicial power which is essential to the fair administration of justice is a further reason why this Court should review the decision below.

II. THIS COURT SHOULD RESOLVE THE LONG-STANDING UNCERTAINTY, STEMMING FROM A CONFLICT BETWEEN TWO OF ITS OWN DECISIONS, CONCERNING THE REQUISITES OF AN INDEPENDENT ACTION IN EQUITY TO SET ASIDE A JUDGMENT

A. The Court of Appeals' additional holding that IBT was not entitled to relief under the theory of an independent action in equity is a further ground for review, because

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[10] The Moore formula has been approved by the Second and Fifth Circuits, in cases cited by the court below (A. 14a-15a): *Martina Theater Corp.* v. *Schine Chain Theaters*, 278 F.2d 798 (2d Cir. 1960); *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); and *Kerwit Medical Products, Inc.* v. *N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). There is no indication that these courts were aware that the "attorney" in *Hazel-Atlas* was not, as Professor Moore mistakenly assumed, an officer of the court.

the requisites of such an action have long been a subject of uncertainty and disagreement among the lower courts. The problem stems from two apparently irreconcilable decisions of this Court. The first of these is *United States* v. *Throckmorton*, 98 U.S. 61 (1878), which established a distinction between "intrinsic" and "extrinsic" fraud, and allowed relief only for extrinsic fraud; in this case the court below followed *Throckmorton* and denied relief on the view that the fraud perpetrated by Great Coastal was not "extrinsic" (18a-19a). The other decision is *Marshall* v. *Holmes*, 141 U.S. 589 (1891).

In *Marshall*, this Court held that a judgment will not be permitted to stand when a defendant has been "prevented by fraud" from learning a fact of which the defendant "might have availed himself" during the proceeding. 141 U.S. 589, 596. The Court followed "the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.'" 141 U.S. at 596. Five decisions of this Court and other authorities were cited in support of this "settled doctrine." There followed this citation: "*See also, U.S.* v. *Throckmorton*, 98 U.S. 61, 65." No other reference to *Throckmorton* appears, and the "extrinsic" fraud requirement is nowhere mentioned.

Less than five years after *Marshall* was decided one Circuit Court of Appeals found "it impossible to reconcile these cases, or to make a definitive choice between them." *Graver* v. *Faurot*, 162 U.S. 435, 436 (1896). However, the certificate which it issued to this Court for a resolution of the quandary was dismissed on technical grounds. *Id.* at 438, quoted at p. 26, *infra*.

A modern Court of Appeals has observed that the "conflict" between *Throckmorton* and *Marshall* "has been a

source of bewilderment to the 'inferior' Courts ever since 1891." *Publicker* v. *Shallcross*, 106 F.2d 949, 951 (3d Cir. 1939).[11] The Third Circuit in *Publicker* chose "the more salutary doctrine of [*Marshall*]" over "the harsh rule of [*Throckmorton*]," concluding, "We believe truth is more important than the trouble it takes to get it." 106 F.2d at 952. *Accord*: *Schum* v. *Bailey*, 578 F.2d 493, 506 (3d Cir. 1978) (concurring opinion). For similar reasons, Judge Learned Hand, speaking for the Second Circuit, rejected the *Throckmorton* rule, reasoning that "[t]he fact that [the unsuccessful party] does not at first succeed in unmasking the machinations of his adversary is no reason for denying him relief after he has finally succeeded in penetrating the complete disguise." *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 137 (2d Cir. 1956). Other courts, however, probably the majority, have adhered to *Throckmorton*.[12]

B. The disagreement as to the requirements for an independent action in equity to set aside a judgment is not limited to the uncertainty as to whether *Throckmorton* or *Marshall* is the authoritative precedent. For even courts which, like the court below, adhere to *Throckmorton*, acknowledge "the considerable criticism leveled against the intrinsic/extrinsic distinction" (A. 18a).

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[11] The controversy was also noted in *Shammas*, *supra*, 9 N.J. 321, 88 A.2d at 208 (1952), the court observing that both *Throckmorton* and *Marshall* had been cited in *Hazel-Atlas*. Hazel had urged the Court to resolve the "irreconcilable conflict between *Throckmorton* and *Marshall*" (Br. for Pet. No. 398, Oct. T. 1943, pp. 29-31). But, as we have seen, the Court decided *Hazel-Atlas* on the fraud upon the court theory.

[12] *See Wood* v. *McEwen*, 644 F.2d 797 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1437 (1982); *Scola* v. *Boat Frances R., Inc.*, 546 F.2d 459 (1st Cir. 1976); *Miller* v. *Meinhard-Commercial Corp.*, 462 F.2d 358 (5th Cir. 1972); *Dowdy* v. *Hawfield*, 189 F.2d 637 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); *King* v. *Richardson*, 136 F.2d 849 (4th Cir.), *cert. denied*, 320 U.S. 777 (1943); *Brady* v. *Beams*, 132 F.2d 985 (10th Cir. 1942), *cert. denied*, 319 U.S. 747 (1943); *Fiske* v. *Buder*, 125 F.2d 841 (8th Cir. 1942).

As Professors Wright and Miller have written:

> The distinction rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. (11 Wright & Miller, Federal Practice and Procedure, § 2868 at pp. 240-241 (1973), footnotes omitted. See also *id.* § 2861, pp. 191-196).

The distinction was also criticized in *Shammas*, *supra*, 9 N.J. 321, 88 A.2d 204, 208-209.

Not surprisingly, the courts have differed widely in applying a distinction "so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation" (cf. Frankfurter, J. in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955)). For example, none of the decisions cited in n. 12, *supra*, utilized the five-point test for identifying "extrinsic" fraud which was embraced by the court below (A. 19a). And even that test is difficult to comprehend and leads courts to inconsistent results in cases where the nature of the fraud is identical. The court below ruled that IBT failed to comply with its third requirement: "fraud that actually prevented an issue from being joined or a party from making a valid claim or defense" (A. 18a). It rejected IBT's independent action on the view that Great Coastal's fraud did not prevent the IBT from discovering or asserting a good defense on the secondary boycott claim (A. 19a). However, IBT had two defenses to that claim—that its picketing was primary, and that responsibility for the picketing could not be attributed to it. On the original appeal it was decided that these were issues for the jury (A. 83a-84a). Accordingly, in rejecting Great Coastal's principal submission on the "fraud upon the court" issue, the Court of Appeals recognized "the possibility that the perjury and fabricated evidence at issue may have been considered by the jury as part of the 'totality of circum-

stances' " pursuant to the trial court's instructions (A. 10a). Plainly, therefore, the Fourth Circuit's ruling that the fraud did not prevent the IBT from asserting a defense rests on the view that a stricter standard of materiality governs in determining whether the fraud prevented the victim from asserting a defense, as required by that court's test for "extrinsic" fraud. In other words, according to the court below, it is not sufficient to sustain an independent action in equity that there has been fabrication of evidence, which was presented to the trier of fact, and which may have affected the outcome. In this respect the decision below is in direct conflict with a decision of the Eighth Circuit which held that this same requirement had been satisfied on strikingly similar facts.

Chicago, R.I. & P. Ry. Co. v. *Callicotte*, 267 F. 799 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921), involved a plaintiff in a personal injury action who obtained a fraudulent judgment by feigning paralysis of his legs. The Eighth Circuit said:

> We have here, therefore, a conspiracy by Callicotte and others (1) to prevent his true condition and the history of his case being known; (2) to swear falsely as to his condition and the history of his case; (3) to produce a false condition and fabricate a false history of the case as a basis for testimony by witnesses other than himself. This conspiracy was directed against the defendant, the defendant's witnesses, and certain of the plaintiff's own witnesses, and against the court, and jury. *Its purpose was not merely to present a false case for plaintiff, but also to prevent the defendant company from putting in its own case in defense.* (267 F. at 802, emphasis added.)

The *Callicotte* court applied the identical five-part test for "extrinsic" fraud which was applied by the court below in this case; compare 267 F. at 810 with A. 19a. Yet the *Callicotte* court determined, contrary to the court

below, that the "fraud * * * prevented the defendant in the judgment from obtaining the benefit of his defense." The only difference between *Callicotte* and this case is in the result: relief from the judgment was granted the defendant there and denied the defendant here. That the same test leads different courts to opposite conclusions in factually indistinguishable circumstances confirms that the intrinsic/extrinsic distinction is utterly unintelligible.

In dismissing the certificate in *Graver* v. *Faurot*, *supra*, Chief Justice Fuller wrote:

> But the whole case is not before us for decision, and the certificate discloses that the doubt of the courts below is based on the assumption that this court has applied well-settled general principles of law differently in two different cases upon the same state of facts. While some hesitation in decision may temporarily result until it is finally determined whether that assumption is justified, and, if justified, the anomaly is corrected, we think such determination ought not to be attempted save where the point must be disposed of on a record after final decree. (162 U.S. at 438.)

Over eighty years have passed, and the "hestitation in decision" has matured into widespread confusion and conflict among the lower courts over the standards governing an independent action in equity. The "anomaly" should be "corrected" *now*, on this "record after final decree," which establishes that the judgment from which petitioners seek relief was the product of a "reprehensible" (A. 17a) scheme to defraud which, in Judge Butzner's words, involved the creation of "spurious" evidence, the use of "false affidavits," prejured testimony," "fabricated exhibits," "a corrupt brief and appendix on appeal" and "payment of large amounts of money to the participants in [the] fraudulent scheme" (A. 33a).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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